Office Supreme Court, U.S.
FILED
AUG 13
ALEXANDER L. STEVAS,

Nos. 82-1326 and 82-1327

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

JAMES G. WATT, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

BRIEF OF RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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QUESTION PRESENTED

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and charter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was supported by the purposes, policies, and legislative history of that provision and its longstanding interpretation by the federal agency charged with administering the Act.

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STATEMENT OF THE CASE

Respondents Natural Resources Defense Council, Inc. *et al.*, hereby adopt the Statement of the Case presented in their Brief in Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 1-8 (filed jointly herein with the State of California and the County of Humboldt, *et al.*), and the Statement of the Case presented by the State of California in its Brief of Respondents herein, which supplements the former Statement.

SUMMARY OF ARGUMENT

In the Coastal Zone Management Act of 1972 (CZMA), Congress created a mechanism to protect the national interest in the beleaguered resources of the nation's coasts. The CZMA encourages coastal states to create coastal management programs meeting the resource-protective standards it sets and to seek federal approval of these programs by the Secretary of Commerce. As an important incentive for state participation in this federal scheme, § 307(c)(1) of the CZMA requires that federal activities "directly affecting" a state's coastal zone must be conducted in a manner that is, to the maximum extent practicable, consistent with a state's federally-approved coastal management program. Both courts below concluded that federal oil and gas Lease Sale 53, proposed by the Department of the Interior (DOI) for the outer continental shelf (OCS) immediately adjacent to California's coastal zone, directly affects that zone and, therefore, must be conducted consistently with California's coastal management program. These decisions are well-reasoned and fully supported by the purposes, policies, and legislative history of the CZMA and should be affirmed.

However, petitioners argue that "directly affecting" should be defined by principal reference not to the CZMA, where the provision at issue appears, but to the Outer Continental Shelf Lands Act (OCSLA), an entirely different statutory scheme promoting petroleum development on the

OCS. They argue, in effect, that the OCSLA is the sole vehicle bestowing federal management authority over the resources of the OCS and, thus, that the CZMA cannot vest other governmental agencies with any OCS management authority that differs from that expressly provided by the OCSLA. However, this Court has specifically recognized that the OCSLA is merely one of several federal statutes, including the CZMA, through which Congress has allocated federal authority over OCS resources.

The provisions of the CZMA affecting OCS management are not subsumed by the OCSLA, but serve an independent national interest, the protection of the fragile resources of the nation's coastlines. This important interest can only be effectuated by applying the consistency provisions of § 307(c)(1) to federal activities with serious foreseeable consequences in the coastal zone, of which OCS lease sales are a prime example, at the earliest practicable time. Despite petitioners' arguments, to do so will not undermine the OCS development mechanisms set up by the OCSLA, for Congress has expressly harmonized the two acts, both through general statements of purposes and policies and through an explicit savings clause in the OCSLA. Thus, the commonsensical construction of "directly affecting" adopted by the courts below properly recognizes Congress' careful accommodation of the national interest in OCS oil production expressed in the OCSLA and the national interest in coastal protection expressed in the CZMA.

In defining "directly affecting," the lower courts properly ignored petitioners' suggestions to start their inquiry with the OCSLA and looked first to the best sources of interpretation of a provision of the CZMA: the purposes and policies behind that act, the legislative history of § 307(c)(1) itself, and the interpretation of the provision by the National Oceanic and Atmospheric Administration (NOAA), the agency charged by Congress to administer the CZMA. All of these sources lead inexorably to the definition of "directly affecting" approved by the lower courts, that a federal activity "directly affects" a state's coastal zone if it sets

in motion a series of events that have consequences in the coastal zone or, put another way, if the activity has a functional interrelationship with the federally-approved coastal program's land and water use policies. Ironically enough, even the relevant passages of the legislative history of the 1978 OCSLA Amendments point to the correctness of this definition and the conclusion that § 307(c)(1) applies to OCS lease sales.

Thus, the lower courts clearly did not err in holding that Lease Sale 53 directly affects California's coastal zone. The lease sale sets the scope for all subsequent activities on the tracts available for lease. It defines the geographic parameters for potential oil drilling in a hitherto undeveloped area of the OCS immediately adjacent to California's coastal zone. During the pre-leasing phase, DOI has formulated the generic lease stipulations that will govern environmental safety and other standards for the conduct of lessees' operations. Postponing application of the consistency requirements of the CZMA to later phases of the OCS oil and gas process—as petitioners urge—would preclude the states from playing any meaningful role in these decisions affecting the nation's vital coastal resources, in derogation of congressional intent. This Court should uphold Congress' carefully designed scheme to protect the national interest in our coasts through cooperative federalism by affirming the lower courts' definition of "directly affecting."

ARGUMENT

I

THE COASTAL ZONE MANAGEMENT ACT IS A VALID CONGRESSIONAL EXERCISE OF THE PARAMOUNT NATIONAL AUTHORITY OVER THE OUTER CONTINENTAL SHELF

In their Brief of Petitioners, the Western Oil and Gas Association, *et al.*, argue that the lower courts erred in holding that an OCS lease sale is a federal activity "directly affecting" the coastal zone within the meaning of § 307 (c)(1) of the CZMA, 16 U.S.C. §§ 1451 *et seq.*, § 1456(c)(1),

because so to hold would derogate the federal government's "exclusive proprietary control over the soil and seabed of the OCS." WOGA Br. at 17-18.[1] WOGA places great emphasis on the "1953 Compromise," the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*, through which Congress ceded to coastal states proprietary control over the continental shelf within three miles (or, in two cases, three nautical leagues) of those states' low tide lines, as evidence that Congress intended exclusive jurisdiction over the OCS to be vested in DOI under the OCSLA, 43 U.S.C. §§ 1331 *et seq.*, a part of that compromise. *Id* at 18.

While respondents do not deny the paramountcy of federal authority over the soil and seabed of the OCS, we do take issue with WOGA's assertion that the OCSLA is the sole vehicle through which that authority has been exercised and that DOI is the sole agent vested with OCS jurisdiction. The 1953 Compromise, the legislative history of the CZMA, other federal statutes, and prior pronouncements of this Court all plainly demonstrate that Congress has properly exercised federal jurisdiction over the OCS in a variety of ways, and that the consistency provisions of the CZMA are one such exercise.

The reliance of WOGA on the decision of this Court in *United States v. Maine*, 420 U.S. 515 (1975), to support its

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[1]For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Brief for Petitioners James Watt, *et al.*, are cited as "DOI Br. at ." References to the Brief of Petitioners Western Oil and Gas Association, *et al.*, are cited as "WOGA Br. at ." References to the Petition for a Writ of Certiorari of James Watt, *et al.*, are cited as "DOI Pet. at ." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at a." References to the Petition of the Western Oil and Gas Association, *et al.*, are cited as "WOGA Pet. at ." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23." Documents from the Joint Appendix are similarly cited, with the abbreviation "J.A." replacing "C.R."

argument that DOI has exclusive jurisdiction over the soil and seabed of the OCS through the OCSLA is sorely misplaced. WOGA Br. at 18-19. In that case, the Court faced the issue of whether the Atlantic coastal states had jurisdiction over the OCS beyond the three-mile territorial limit established in the 1953 Compromise, by virtue of historical rights that these states asserted arose from their pre-1776 status as English colonies. The Court rejected their claims on the grounds that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty."[2] 420 U.S. at 524. The Court examined the states' claim that Congress, in the 1953 Compromise, which "did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act," repudiated those paramount rights. 420 U.S. at 525. It held that this was not the case, but rather that this grant of dominion was "merely an exercise" by Congress of the paramount federal authority over the OCS. 420 U.S. at 524-26.[3]

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[2]WOGA is of course correct that this Court recently reaffirmed that the United States has paramount rights to the OCS seabed beyond the three-mile limit in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 n.7 (1981), and *Maryland v. Louisiana*, 451 U.S. 725, 752-53 n.26 (1981). WOGA Br. at 18. However, this principle does not translate, as WOGA would have it, into one of the paramount control of the OCS by DOI through the provisions of the OCSLA. DOI is not the United States, but merely one agency of the federal government. It is Congress that determines how the paramount national authority over the OCS is to be allocated, and, as its grant of control over the submerged lands within the three-mile limit in the 1953 Compromise demonstrates, it may even assign that authority entirely to the coastal states if it finds this to be in the national interest.

[3]A series of earlier decisions of this Court make clear that the federal government, prior to 1953, had dominion over all submerged lands beyond the marine low tide line. *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). Thus, in the 1953 Compromise, Congress ceded to the states what previously was a zone exclusively under federal jurisdiction.

It readily follows that, if Congress, in its exercise of federal jurisdiction over the seabed, can grant dominion over a portion thereof to the states, it most certainly can involve the states in a federal scheme of coastal management that allows them some lesser share of authority over the management of the OCS. The CZMA is one such scheme, as this court explicitly recognized in *United States v. Maine:*

> *Exploitation of our resources offshore* implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, *to the more recent Coastal Zone Management Act.*

420 U.S. at 528 (footnote omitted; emphasis added).[4]

That Congress had the power to provide authority over the OCS through enactment of the consistency provisions of the CZMA is affirmed by *United States v. Maine*; that it expressly intended to do so is apparent not only from the explicit reference to the CZMA in that decision but from the relevant legislative history of both the CZMA and the

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[4]The Court made plain that its reference was to resources of the OCS by citing with approval, in a footnote to the quoted language, a Senate Commerce Committee print that summarized the "legislation affecting the Outer Continental Shelf." 430 U.S. at 528 n.8. This report states:

> Several federal statutes contain policy objectives and *collectively* establish a legal and administrative system for the *management and control of outer continental shelf oil and gas development.*

Outer Continental Shelf Oil and Gas Development and the Coastal Zone, A Report for the Committee on Commerce, U.S. Senate, 93d Cong., 2nd Sess. 55 (Comm. Print 1974) (emphasis added). In addition to the OCSLA and the CZMA, this report lists the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, as among those that establish the federal system for management and control of OCS oil and gas development. *Id.*

OCSLA. As we will demonstrate, this legislative history plainly evidences the intent of Congress that the consistency provisions of § 307(c)(1) apply to DOI's OCS lease sales. *See* Part III.C. and D., *infra*.

In light of *U.S. v. Maine*, the legislative history, and other statutes that affect OCS management, WOGA's reliance on the "clear statement" rule is plainly misplaced.[5] WOGA Br. at 18. Congress did not assign exclusive control over the OCS to DOI in the 1953 Compromise.[6] Rather, as this Court recognized in *Maine*, the cession of dominion over the seabed to the coastal states in the Compromise

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[5]WOGA's citation of *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 285 (1973), highlights a further irony of the "clear statement" doctrine WOGA presses upon this Court. WOGA Br. at 18. As the *Employees* case illustrates, this Court has regularly used the "clear statement" doctrine out of *solicitude* for legitimate state concerns. As in *Employees*, this Court should be "reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat . . . states so harshly" as to deny federally-approved state programs all effect at the lease sale stage, when these sales have such extraordinary impacts upon the coastal zone. 411 U.S. at 286. The reasonable expectations of states which *voluntarily* enter into a cooperative partnership with the federal government should be protected—not frustrated, as WOGA would have it—by the clear statement doctrine. *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). Since OCS development has long been understood as one of "the most significant Federal actions affecting the coastal zones," *see infra at* 28-29, now to deny participating states a substantive role at the stage of OCS development "which establishes the basic scope and charter" for subsequent events, DOI Pet. at 13a, would retroactively destroy one of the principal original incentives for state participation. *See* H.R. Rep. 878, 94th Cong., 2d Sess. 53 (1975).

[6]The cases that WOGA cites for the proposition that the OCSLA is a comprehensive scheme for regulation of the OCS, preempting the field of OCS management, do not support that proposition. WOGA Br. at 31. At best, these cases simply conclude that specific provisions of the OCSLA are controlling in specific fact situations. The same could be said of the provisions of virtually any statute and would in no way indicate a congressional intent to make that statute the exclusive vehicle for regulation of a given field. More-

underscored Congress' authority to provide for the management of the OCS in whatever ways would best serve the national interest, and the CZMA represents another legitimate exercise of that authority. Thus, no "clear statement" of specific application to DOI's OCS leasing activities is necessary on the face of § 307(c)(1) in order for this provision to so apply.[7] The pronouncements of Con-

over, none of these cases involved the relationship of the OCSLA to the CZMA.

WOGA's claims of OCSLA exclusivity as regards management of the OCS also ignore other federal statutes that plainly affect its management (see n. 4, *supra*, and n. 7, *infra*) and, indeed, § 307(c)(3)(B) of the CZMA, which specifically creates a procedure for consistency certification of OCS lessees' activities at the exploration and development-production phases. 16 U.S.C. § 1456(c)(3)(B). Given the way in which WOGA presents its argument, it is apparent that it would like the Court to believe that this section of the CZMA, enacted in 1976, is actually a part of the 1978 OCSLA Amendments. WOGA Br. at 28, 30-31. But Congress in 1978 amended the OCSLA to recognize a provision affecting the management of the OCS that it had created two years earlier *as part of the CZMA*, not the reverse. WOGA's theory of OCSLA exclusivity in the management of the OCS simply cannot withstand the weight of other federal statutory provisions, both specific and general, that provide a share of OCS management authority to governmental entities other than DOI.

[7]An analogous situation is presented by the Marine Protection, Research, and Sanctuaries Act (Marine Sanctuaries Act), 16 U.S.C. §§ 1431-1434. That act authorizes the Secretary of Commerce, with presidential approval, to designate as marine sanctuaries certain offshore areas "which he determines necessary for preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values." 16 U.S.C. § 1432(a). Under the Marine Sanctuaries Act, the Secretary of Commerce must identify "the types of activities that will be subject to regulation" in the sanctuary, 16 U.S.C. § 1432(f)(1), and "shall issue necessary and reasonable regulations to implement the terms of the designation and control the activities described in it." 16 U.S.C. § 1432(f)(2).

Nowhere is DOI's OCS oil leasing program specifically mentioned on the face of the Marine Sanctuaries Act. Yet in two instances, pursuant to the Act, the Secretary of Commerce has designated, and the President has approved, marine sanctuaries in which

gress and this Court provide ample evidence of the propriety of such application.

II

WHILE THE TWO STATUTES ARE FULLY COMPATIBLE, THE COASTAL ZONE MANAGEMENT ACT SERVES NATIONAL PURPOSES DISTINCT FROM THOSE SERVED BY THE OUTER CONTINENTAL SHELF LANDS ACT. THESE PURPOSES CAN BE PROPERLY EFFECTUATED ONLY THROUGH BROAD APPLICATION OF THE PROVISIONS OF § 307(c)(1)

As previously noted, WOGA adopts the erroneous position that the OCSLA is the only federal statute affecting the management of the petroleum resources of the OCS. This faulty premise leads to WOGA's assertion that the OCSLA provides states with their sole means of involvement in the OCS leasing process. WOGA Br. at 21-31. To the extent that any provisions of the CZMA apply to DOI's OCS activities, WOGA attempts to portray them as part of the OCSLA statutory scheme. This argument

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leasing of OCS tracts for oil exploration and development is expressly forbidden. These are the Point Reyes-Farallon Islands Marine Sanctuary, 46 Fed. Reg. 7936 (1981), and the Channel Islands Marine Sanctuary, 45 Fed. Reg. 65198 (1980).

The routine application of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, to OCS lease sales also makes manifest the error of WOGA's invocation of the "clear statement" rule. Nowhere in the OCSLA or NEPA is there an explicit statement that the general provisions of NEPA requiring the preparation of environmental impact statements will apply to DOI's OCS lease sale proposals, yet it is beyond dispute that these provisions fully apply to them. *See, e.g., County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977). The same is true of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq. See North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

Clearly, Congress has allocated authority over the OCS not only through the OCSLA, but through other statutory vehicles, and not only to DOI, but to other agencies. No "clear statement" regarding the OCSLA is necessary for Congress to effectuate a provision, such as § 307(c)(1), that further allocates OCS authority.

seriously misreads both the CZMA and the OCSLA, denying any independent meaning to various provisions of the former while reading into provisions of the latter meanings that Congress never intended and that are at odds with the statutory language.

As will be seen in what follows, the CZMA and the OCSLA are independent but fully compatible federal schemes promoting separate national interests, both of which affect the management of the resources of the OCS. While the OCSLA is aimed at the orderly development of petroleum reserves offshore, the CZMA is intended to provide protection for the sensitive resources of the nation's coastlines. To interpret the CZMA's consistency provisions as entirely subsumed in the provisions of the OCSLA—as WOGA would have it—would obliterate the distinct purposes for which Congress enacted the CZMA.

A. The Purposes of the Coastal Zone Management Act, and the Mechanisms Through Which Those Purposes Are To Be Carried Out, Are Distinct from Those of the Outer Continental Shelf Lands Act

WOGA's lengthy analysis of the OCSLA and, in particular, the scheme it creates for state involvement in the OCS leasing process, is intended to support its conclusion that the OCSLA provides the only vehicle for state involvement and, hence, that the requirements of the CZMA, to the extent they apply at all to OCS leasing, are completely subsumed by the OCSLA.[8] WOGA Br. at 21-31. However, this analysis completely ignores the vastly different national purposes served by the two statutes in question and the distinct mechanisms each provides for state involvement in leasing decisions.

The OCSLA is a statute focused upon the development of the mineral resources of the OCS. *See, e.g.*, 43 U.S.C. §§ 1332, 1802. The Secretary of the Interior and his department are charged with implementing the OCSLA.

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[8] While not arguing this point at any length, DOI seems to agree with WOGA's analysis. DOI Br. at 42.

43 U.S.C. § 1331(b). Provision is made in the OCSLA for affected coastal states and local governments, through their governors, to submit "recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan." 43 U.S.C. § 1345(a). The manner in which the Secretary must respond to these recommendations is also prescribed. 43 U.S.C. § 1345(c).

The CZMA serves an entirely different purpose than the OCSLA, through a distinct statutory and regulatory scheme.[9] Its primary focus is on the protection of the national interest in the resources of the nation's coastal zones. See 16 U.S.C. §§ 1451-52.[10] To achieve this purpose, the Act provides for the promulgation of coastal management programs by the individual coastal states, which programs must meet the federal standards it prescribes. 16 U.S.C. §§ 1454-55. The Secretary of Commerce is empowered to approve proposed state coastal management programs if these meet the requirements of the Act. 16 U.S.C. §§ 1453(16), 1455. Among these requirements, a single state agency must be authorized to administer the coastal program. 16 U.S.C. § 1455(c)(5). Once a state's program receives federal approval, all federal agencies' activities "directly affecting" that state's coastal zone must be consistent, to the maximum extent practicable, with the program. 16 U.S.C. § 1456(c)(1). Under the Department of Commerce's regulations implementing this consistency requirement, it is the state's authorized coastal management agency that responds to a federal agency's initial

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[9] *See generally* Linsley, Federal Consistency and Outer Continental Shelf Oil and Gas Leasing, 9 Boston C. Envt'l Affairs L. Rev. 429 (1981).

[10] *See also American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979) ("Although sensitive to balancing competing interests, [the CZMA is] first and foremost a statute directed to and solicitous of environmental concerns"). A more thorough discussion of the purposes and policies behind the congressional enactment of the CZMA is presented in Part III.E, *infra*.

determination as to the consistency of its proposed activity with the state's coastal program. 15 C.F.R. §§ 930.18, 930.41-.42.

The uniqueness of the two statutes is obvious, but several points of distinction specifically regarding their applicability to OCS lease sales bear further examination here. Section 19 of the OCSLA, 43 U.S.C. § 1345(a), allows a state's governor and, through the governor, local government executives, to make recommendations about the size, timing, and location of a proposed lease sale based upon the state's and local government's parochial concerns with the sale. Such officials in *any* coastal state that would be affected by proposed leasing may make these recommendations. *Id.* The Secretary of the Interior must accept the recommendations unless he determines that they do not provide "a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c).

In contrast, under the provisions of the CZMA and NOAA's regulations implementing it, DOI must ensure that its proposed lease sale is consistent, to the maximum extent practicable, with the state's federally-approved coastal management program through preparation of a consistency determination. 15 C.F.R. § 930.34. The state's coastal management agency, not its governor, responds to this determination. Only those states for which the Secretary of Commerce has approved a coastal management program can avail themselves of § 307(c)(1). DOI's determination and the agency's response are based not upon the state's and local governments' general concerns but solely upon the provisions of the federally-approved program.

Clearly, the types of state involvement in OCS leasing proposals envisioned by the two statutes are not interchangeable.[11] Compliance with the provisions of the OCSLA

[11]In the face of these radically different schemes, WOGA amazingly suggests that § 19 of the OCSLA is the proper vehicle through which a state should present its consistency concerns about a

does not replicate compliance with those of § 307(c)(1). The latter specifically require DOI to focus on the state's federally-approved coastal program and place upon DOI a duty to conduct its lease sale consistently, to the maximum extent practicable, with that program. The state coastal management agency, the agency with the greatest expertise on the provisions and application of the program, is afforded a formal mechanism for response. This process is intended to protect the national interest in the resources of the coastal zone through federal agency compliance with state-generated, federally-approved management programs. Neither § 19 nor any other provision of the OCSLA fulfills these purposes, and, thus, WOGA's attempt to portray application of § 307(c)(1) of the CZMA at the OCS leasing stage as redundant with or subsumed by those provisions must fail.[12]

B. The Consistency Provisions of the Coastal Zone Management Act Are Fully Compatible with the Provisions of the Outer Continental Shelf Lands Act

Related to its arguments that the consistency provisions of § 307(c)(1) are subsumed by the state involvement provisions of the OCSLA is WOGA's portrayal of the lower court's conclusion that § 307(c)(1) is applicable to OCS

proposed lease sale to the Secretary of the Interior. WOGA Br. at 27. WOGA would like the Court to ignore the divergent purposes the statutes serve and compress an independent statute whose requirements it finds inconvenient into another, less troublesome one. *See* H.R. Rep. No. 269, 97th Cong., 1st Sess. 11-12 (1981).

[12]The consistency provisions of the CZMA have always been viewed by Congress and the states as a major incentive for the states to create coastal management plans in compliance with the CZMA. *See, e.g.*, H.R. Rep. No. 878, 94th Cong., 2d Sess. 53 (1975). As federal oil and gas activities on the OCS are regarded "as among the most significant Federal actions affecting the Coastal Zones," Outer Continental Shelf Oil and Gas Development and the Coastal Zone, *supra*, n. 4, at 79, it would have been illogical for Congress, in § 307(c)(1), to have provided no duty regarding OCS leasing sales distinct from that in § 19 of the OCSLA, which is available to any coastal state, with or without a federally-approved coastal management program.

lease sales as incompatible with the purposes and policies of the OCSLA. WOGA Br. at 31-32; 44-46. DOI advances a similar view. DOI Br. at 41-49. Both raise the spectre that the lower courts' finding of applicability of § 307(c)(1) to OCS lease sales will thwart the national interest in OCS development as expressed through the OCSLA by giving states a veto over DOI's leasing plans. DOI Br. at 27, 47; WOGA Br. at 44-46.

An examination of the provisions and purposes of the OCSLA and the workings of § 307(c)(1) of the CZMA shows the fallacy of these arguments. The lower courts' application of § 307(c)(1) to DOI's OCS lease sales is fully consonant with the OCSLA; moreover, the express terms of § 307(c)(1), and the NOAA regulations implementing it, demonstrate that the provision does not grant the states veto authority over OCS lease sale proposals.

Turning first to the provisions of the OCSLA, while it is true that a primary purpose of that act is to promote the "expeditious and orderly development" of the oil and gas resources of the OCS, 43 U.S.C. § 1332(3), this is not the sole purpose or policy it is intended to serve. Indeed, such development is expressly "subject to environmental safeguards." *Id.; see also* 43 U.S.C. § 1802(2)(B), (7). Further,

> *the rights and responsibilities of all States* and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments *through such means as regulation of land, air, and water uses, . . . and of related developments and activity* should be considered and recognized.

43 U.S.C. § 1332(5) (emphasis added); *see also* 43 U.S.C. §§ 1332(4), 1802(4), (5), (6). Thus, while the OCSLA is aimed at orderly, and even expedited, development of oil and gas resources of the OCS, it is by no means a monolithic mandate to lease every acre of the OCS that might overlie recoverable petroleum regardless of a countervailing national interest in other resources and the potential adverse environmental consequences.

For its part, the CZMA requires state coastal zone management programs to have provided "adequate consideration of the national interest involved in planning for, and in the siting of [energy] facilities . . . which are necessary to meet requirements other than local in nature" before such programs may be approved by the Secretary of Commerce. 16 U.S.C. § 1455(c)(8); *see also* 16 U.S.C. § 1454 (b)(8). Prior to such approval, the Commerce Secretary must also ensure that the views of the federal agencies affected by the proposed program were adequately considered during its promulgation. 16 U.S.C. § 1456(b).[13]

These provisions from both acts plainly reveal that their purposes and policies are not antithetical. Rather, Congress has expressly harmonized the two schemes. Thus, to the extent that a state coastal management program, federally approved pursuant to the requirements of the CZMA, circumscribes OCS leasing decisions by DOI under the provisions of § 307(c)(1), this is fully in keeping with the purposes and policies of both acts. Read together, the CZMA and the OCSLA promote the national interest in offshore oil development responsive to the protection of other coastal resources.

Very explicit evidence that the application of § 307(c)(1) to OCS lease sales is compatible with the provisions of the OCSLA is provided by the savings clause of the OCSLA Amendments of 1978, which states:

> Except as otherwise *expressly provided* in this chapter nothing in this chapter shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972. . . .

43 U.S.C. § 1866(a) (emphasis added). This provision completely undercuts the claims of DOI and WOGA that the state involvement provisions of the 1978 OCSLA Amendments comprise an expression by Congress that the provi-

[13] DOI was among the agencies whose views were considered in the formulation of California's program. California Coastal Management Program, C.R. 3, Cal. Exh. L-18, Attachment J.

sions of § 307(c)(1) do not apply to DOI's OCS lease sales.[14] DOI Br. at 28-30; WOGA Br. at 32.

Finally, we must lay to rest the fears raised by petitioners that the lower courts' determination that

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[14]Petitioners' reliance on § 307(e) of the CZMA, 16 U.S.C. § 1456(e), a general savings clause, for the proposition that § 307(c)(1) does not apply to OCS lease sales is unavailing. DOI Br. at 26; WOGA Br. at 39. First, it completely ignores the fact that NOAA, in its regulations concerning the consistency provisions of § 307(c)(1), has specifically addressed § 307(e):

> The duty the Act imposes upon Federal agencies is not set aside by virtue of section 307(e). The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

15 C.F.R. § 930.32(a). In a comment to this regulation, NOAA noted: "Federal agency conformance with existing law is preserved as a result of section 307(e) of the Act. . . ." 44 Fed. Reg. 37146 (1979).

Second, the correctness of NOAA's analysis of § 307(e)—that it is simply intended to make clear that the required federal consistency with federally-approved CZMA programs is itself circumscribed by the requirements of existing law—is borne out by the legislative history of § 307(c)(1). The history of that specific provision demonstrates Congress' intent that it "cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies," including DOI's OCS leasing decisions. See Part III.C., *infra*. To read the general provisions of § 307(e) to deny a substantive application of § 307(c)(1) to OCS lease sales—and, by implication, other federal activities—would improperly override the express intent of Congress.

Finally, petitioners once again promote the erroneous notion that DOI *is* the federal government. While the CZMA shifted some federal jurisdiction, rights, and responsibilities "in the field of planning, development, or control of . . . submerged lands" from DOI to the Department of Commerce, this scarcely amounts to a diminution of *federal* jurisdiction in contravention of § 307(e).

§ 307(c)(1) consistency applies at the lease sale stage will somehow amount to a state veto, derailing the OCS development scheme created by Congress in the OCSLA. None of the respondents has ever maintained that § 307(c)(1) provides states a veto over DOI's leasing proposals. An examination of the section and NOAA's regulatory scheme for its implementation plainly shows that no such veto exits.

The duty that § 307(c)(1) imposes is upon the federal agency conducting the activity—here DOI—not on the state. It is DOI's duty under the section to conduct its activities in a manner consistent to the maximum extent practicable with the state's coastal management program. Thus, NOAA's regulations provide that it is DOI that performs the consistency determination for its proposed activity and submits that determination to the state. 15 C.F.R. §§ 930.34, 930.37. The state is given a formal opportunity to respond to the DOI consistency determination. 15 C.F.R. § 930.41-.42. In the event of a serious disagreement over consistency, either party may seek mediation by the Secretary of Commerce. 15 C.F.R. § 930.43[15] However, if mediation is not sought or proves unsuccessful, DOI may, at its discretion, go forward with the proposed lease sale based on its consistency determination.[16] If DOI does proceed in the face of a dispute, the state may of course exercise its option to sue in order to enjoin the proposed lease sale. In that event the court will examine the propriety of DOI's consistency determination, *i.e.*, it will

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[15] *See generally* 15 C.F.R. §§ 930.110-.116. Mediation is only available if all agencies in disagreement consent to participate. 15 C.F.R. § 930.112. It is not mandatory upon the parties to the disagreement nor, consequently, prerequisite to judicial review. 15 C.F.R. § 930.116.

[16] While a comment to the NOAA regulations encourages federal agencies to "suspend implementation of the activity beyond the 90-day period [of notice to the state that the regulations require] pending resolution of the disagreement," 44 Fed. Reg. 37149 (1979), it is clearly within a federal agency's discretion to go forward with a disputed activity if it determines to do so.

review the Secretary of the Interior's application of the provisions of the state's federally-approved coastal management program to the lease sale at issue.

In sum, under § 307(c)(1) as applied to a proposed OCS lease sale, *DOI* makes the consistency determination, *DOI* decides whether to go forward with the sale in the face of a dispute with a state's coastal management agency, and *DOI*'s application of the provisions of the state's program (itself approved by the Secretary of Commerce as in conformity with the national requirements of the CZMA) is the subject of any judicial review that follows.[17] This scheme can scarcely be characterized as a state veto of a federal program. Quite plainly, it represents a federal mechanism for the reconciliation of two important but sometimes competing national interests, offshore oil production and coastal resource protection. This mechanism, carefully wrought by Congress and the agency charged with implementing Congress' intent, should not be set aside in the name of protecting one federal agency, which erroneously purports to be the sole repository of federal management authority over the OCS, from alleged "state interference" that is actually an integral part of a national program of cooperative federalism.

III

THE MEANING THE LOWER COURTS GAVE "DIRECTLY AFFECTING" IS THE PROPER ONE

Petitioners urge that this Court bend the obligations and statutory duties created by the CZMA to match the special procedures of the OCSLA. WOGA Br. at 21-31; DOI Br. at 27-35. But to "look first to [the] provisions" of the OCSLA, WOGA Br. at 21-22, and then to insist that the CZMA be given a crabbed reading in order to assure that its requirements never go beyond the OCSLA's is to do things backwards by ignoring the CZMA itself, its pur-

[17] It is also worthy of note that, if a state abuses its coastal management program, the Secretary of Commerce can withdraw approval. 16 U.S.C. § 1458(d).

poses, policies, and history. Despite the lip service petitioners pay to the "plain meaning" rule, the structure of their argument is essentially designed to outflank the self-evident proposition that where a statutory provision is to be construed, this Court should look first to the statute in question. Once the language, statutory purposes, legislative history, and agency interpretation of *the CZMA* are examined in any detail, it becomes evident that the construction of § 307(c)(1) adopted by the courts below is correct.[18]

A. Petitioners' Invocation of the "Plain Meaning" Rule Is Misguided

The starting place in every case involving construction of a statute is the statutory language itself. *Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1587, 1591-92 (1983). However, this rule is not to be applied rigidly. As this Court recently held, the plain meaning rule is "rather an axiom of experience than a rule of law." *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48-49 (1928)); *see also Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

The District Court properly held that the exact meaning of § 307(c)(1)'s threshold "directly affecting" language is neither clear nor unambiguous; the Act itself provides no definition of the phrase. DOI Pet. at 41a. As even a cursory review of this court's decisions demonstrates, the words "direct" and "directly" mean different things in different contexts, and a definition correct in one setting cannot be mechanically applied to another. *Compare, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 307 (1936) ("direct" implies "proximate" causation) *with United States v. SCRAP*, 412

[18]Every court that has examined this issue so far has reached the same result. *See Conservation Law Foundation v. Watt*, 560 F. Supp. 561 (D. Mass. 1983), *appeals pending*, 83-1258 (1st Cir.) (Lease Sale 52); *Kean v. Watt*, No. 82-2420 (D.N.J., Oct. 8, 1982) (Reoffering Sale 2); *California v. Watt*, 17 E.R.C. 1711 (C.D. Cal., June 9, 1982) (Lease Sale 68).

U.S. 669, 687 (1973) (chain of causation with several intermediate links would "directly harm" plaintiff group and give it a "direct" stake in an Article III controversy) and *Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1591-99 (policies underlying statutory phrase "directly pertain" informed judicial distinction between "direct" costs and "indirect" costs). Petitioners' strained arguments notwithstanding, the words "directly affecting" do not on their face present a self-defining standard whose "plain meaning" obviates recourse to the purposes, policies, history, and administrative interpretation of the CZMA.

In the District Court, petitioners offered a variety of definitions of the word "direct" from a dictionary. Ultimately, however, the "plain meaning" they assigned the term was a definition of their own making, which selectively combined those particular definitions that suited their purposes and ignored the rest. DOI Br. at 58a-59a. Continuing their semantic sophistry in this Court, petitioners argue that "conventional construction" of the term "directly" requires that the condition invoked shall operate "proximately" or "without any intervening agency, instrumentality or influence." DOI Br. at 21-22.

However, as the District Court correctly noted, tort concepts of "proximate" and "intervening" cause were created by the courts to *limit* tort liability and are irrelevant to a statute designed to *foster* intergovernmental cooperation and coordination in the management of coastal resources. *Id.* at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.

Petitioners also cite the definitions of "direct" and "indirect" effects in the Council on Environmental Quality's regulations implementing the National Environmental Policy Act. WOGA Br. at 36-37; DOI Br. at 22 n.19. This reliance on a definition adopted by an agency without

any responsibility for interpreting the CZMA,[19] defining an unrelated statute designed to serve different policies, and promulgated several years *after* the passage of the CZMA and the 1976 CZMA Amendments—indeed, after the California Coastal Management Program had been duly created by the state and approved by the federal government[20]—is sorely misplaced. In fact, petitioners elsewhere acknowledge important differences between NEPA and CZMA review but fail to grasp their significance. WOGA's Reply Brief of Petitioners (on Petition for Certiorari) at 1-2, DOI Br. at 45-46. Precisely because § 307(c)(1) consistency review is substantive—not procedural, like NEPA review—foreseeable effects with extraordinary significance for the coastal zone should be reviewed as early as possible. In the words of the Senate Commerce, Science and Transportation Committee, § 307 (c)(1) review allows "Federal agencies . . . to conform their activities to State coastal zone management requirements *before* committing public resources to an effort which might be found to be inconsistent." S. Rep. No. 783, 96th Cong., 2d Sess. 10 (1980) (emphasis added). The CZMA goals of comprehensive coastal planning and maximal intergovernmental coordination would obviously be frustrated by disregarding the state coastal plan until the long-foreseeable effects of OCS development are so imminent that the state cannot adequately plan for them. *See* DOI Pet. at 46a.

In short, it is surely no departure from any "plain meaning" of § 307(c)(1) to say that the "direct" effects of a lease are the intended and foreseeable uses for which

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[19]Curiously, at the same time that they seek to invoke these regulations implementing NEPA, they disregard the regulations implementing § 307(c)(1) that were adopted by NOAA, the one agency to which Congress gave CZMA responsibility. DOI Br. at 36-38. *See* discussion in Part E., *infra*.

[20]The California Coastal Management Program was approved on November 7, 1977. The NEPA regulations cited by petitioners were issued Nov. 29, 1978. *See* 43 Fed. Reg. 56003 (1978).

the tract was leased—in this case, oil and gas development.[21] The fact that intermediate approvals are required for the subsequent *private development* does not make the effects of the federal activity, the sale of leases, any less "direct."[22]

B. The Purposes and Policies of the CZMA Support the Lower Courts' Construction of Section 307(c)(1)

Precisely because the "directly affecting" clause is capable of various interpretations—because, that is, petitioners are wrong in asserting that the clause has one and only one obvious and self-defining "plain meaning"—a careful analysis of the CZMA's purposes and policies is in order.[23]

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[21]Petitioners also suggest that a "direct effect" under § 307(c)(1) must be "physical" as well as immediate. DOI Br. at (i), 2, 21; WOGA Br. at 12, 16, 26 n.19, 27. Such a suggestion not only is a fabrication out of whole cloth, but also is inconsistent with the language and policies of the CZMA addressing a wide range of coastal zone effects, including economic, social, demographic, cultural, residential, aesthetic, recreational, commercial, and industrial impacts. 16 U.S.C. §§ 1451-52.

[22]This straightforward application of § 307(c)(1) to an OCS lease sale does not threaten to subject every other "federal activity" —however "indirect"—to consistency review, as petitioners imply. *See, e.g.*, DOI Br. at 24-26. Thus, for example, if a federal agency were to impose a restriction on foreign oil imports, one might well hypothesize "effects" on a state's coastal zone from the resulting inducement for additional domestic OCS oil and gas production. However, that kind of effect is one which clearly operates "indirectly," or, to use petitioners' terms, "mediately, remotely or collaterally". Although DOI warns of the dire effects of accepting the lower courts' interpretation of "directly affecting," its heroic efforts to drum up a parade of horribles are unpersuasive. In fact, the entire parade consists of a lone participant, a hypothetical involving coal leasing in Wyoming, DOI Pet. at 20 n.21, that is easily distinguishable from this case. *See* Brief in Opposition to Petitions for a Writ of Certiorari at 28 n. 37.

[23]*See Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1592 n.7, where this Court looked to the purposes underlying the statute in question to inform the meaning of the phrase "directly pertain," a phrase that, like "directly affecting," is not self-defining.

Such an analysis confirms the correctness of respondents' and the lower courts' common sense approach to the meaning of the clause.

The CZMA was enacted by Congress in 1972 because of the recognized need for increased protection of the natural, biological and physical resources of the coastal zone. The CZMA emphasizes the "[i]mportant ecological, cultural, historic, and esthetic values in the coastal zone," 16 U.S.C. § 1451(e), and states that population growth and economic development, including mineral extraction and fossil fuel development, "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion." 16 U.S.C. § 1451(c).

In passing the Act, Congress was responding to national problems. The Senate Report emphasizes that passage of the Act was based on the following findings: that by 1964, over one quarter of the nation's salt marshes had been destroyed; that the commercial fishery of the United States depends on coastal and estuarine waters and marshlands as fish nursery areas and spawning grounds; that increased commercial and recreational demand in the coastal zone endangers biologic organisms; and that the fragmentation of state and local government authority in the coastal zone has exacerbated pressure for economic development. S. Rep. No. 753, 92d Cong., 2d Sess. 2-6 (1972). *See also* H. R. Rep. No. 1049, 92d Cong., 2d Sess. 10 (1972).

Underlying the whole congressional consideration was the recognition that existing statutes and institutions had been unable to curb the abuses of coastal resources. This is reflected in the specific finding in the CZMA that existing legal and institutional frameworks were inadequate to address the coastal problems facing the nation. 16 U.S.C. § 1451(h). In light of this finding, states were called upon to develop comprehensive programs to manage their coastal resources. The 1972 Senate Report specifically states that "[t]he intent of this legislation is to enhance state au-

thority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones." S. Rep. No. 753 at 1.

To induce the states to develop and implement comprehensive management programs, Congress provided that federal activities must be consistent with the approved programs. § 307(c), (d) of the CZMA; 16 U.S.C. § 1456(c), (d). This requirement is the principal permanent inducement to a state's development of a coastal management program. DOI Pet. at 43a-44a. It assures the state a central role in managing its coastline and prevents federal actions from undermining the state's plan once federally approved. Any interpretation of the phrase "directly affecting" in § 307 (c)(1) must give due consideration to this central role the CZMA gives coastal states in planning for and managing development affecting their coasts. Unless states are involved in planning for such development, the comprehensive management programs that Congress found were needed to serve important national interests will be severely undermined.[24]

C. The Legislative History of the CZMA Confirms the Lower Courts' Construction of Section 307(c)(1)

The legislative history of the CZMA overwhelmingly supports the Ninth Circuit's and the District Court's interpretation of § 307(c)(1). The CZMA was enacted in 1972, and amended in 1976 and 1980. In 1971, while favorably report-

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[24]Also worthy of special note is § 303 of the 1972 CZMA:

> The Congress finds and declares that it is the national policy . . . (c) for *all* Federal agencies engaged in programs *affecting* the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this chapter.

16 U.S.C. § 1452(c) (emphasis added). While modifying the language of § 303 in 1980, Congress specifically noted that the section as amended continues to support application of § 307(c)(1) to DOI's *OCS lease sales*. H.R. Rep. No. 1012, 96th Cong., 2d Sess. 35 (1980).

ing an earlier bill that would have required consistency for federal agency activities "in the coastal zone," the Senate Committee on Commerce declared:

> [I]t is intended that any lands or water under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with lands and water within the coastal and estuarine zone, should be administered consistent with approved State management programs.

S. Rep. No. 526, 92nd Cong., 1st Sess. 30 (1971); *see also id.* at 20. Foreshadowing the "directly affecting" standard that eventually was adopted as part of the 1972 CZMA, the above-cited language evinces a congressional intent that the federal agency consistency provisions be interpreted in a liberal, commonsensical, and *functional* way—not in a narrow and technical fashion as petitioners urge. This "functional interrelationship" formulation was subsequently adopted by the House Committee on Merchant Marine and Fisheries,[35] and has been quoted with approval and relied upon by NOAA in its consistency regulations.[36] It clearly supports the decisions of the courts below.

1972: The "directly affecting" language at the core of this case was first added by the 1972 Conference Committee. Prior to conference, both House and Senate versions spoke only of consistency for agency activities "in the coastal zone." In the face of this clear congressional choice to *expand* the agency consistency requirements, DOI curiously attempts to portray the conference substitution as a restrictive compromise "drafted to serve a limiting function." DOI Br. at 23-24.

According to DOI, the "directly affecting" substitution was the result of a decision to split the difference between

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[35] H. R. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980).

[36] *See, e.g.*, 44 Fed. Reg. 37143 (1979).

the House and Senate definitions of the coastal zone in § 304. Federal lands had been excluded by definition from the coastal zone in the Senate Bill, but they were included in the House version. In conference, DOI suggests, the Senate coastal zone definition was retained in § 304, and the words "directly affecting" were inserted in § 307(c)(1) "to identify those activities on federal lands within the confines of a state's coastal zone that would be subject to the consistency requirements of the Act while at the same time excluding other activities from such requirements." *Id.* at 24. There are two serious problems with DOI's argument.

First, it logically proves too much. If, as DOI suggests, the "directly affecting" language was designed simply as a middle position between two definitions of the coastal zone, then areas completely outside the zone, such as the OCS, would be generically exempt. Yet this conclusion is inconsistent with DOI's position before the Ninth Circuit that § 307(c)(1) *does* apply to OCS pre-leasing activity.[27] Transcript of Oral Argument Before Ninth Circuit (January 15, 1982) at 10. In fact, later in its brief before this Court, DOI continues to suggest that it agrees with the Department of Justice's position that the applicability of § 307(c)(1) to an OCS lease is a question that cannot be answered generically but must be determined on a case-by-case basis. DOI Br. at 37 n.30; *see also* WOGA Br. at 26 n.19.

Second, DOI's argument that the phrase "directly affecting" was "drafted to serve a limiting function" is absolutely unsupported by the legislative history of the Conference Committee. Indeed, DOI admits as much.[28]

[27] It is, of course, also at odds with the "plain meaning" of the language of the conference substitute, which evinces no hint that federal lands inside the coastal zone (as that zone had been defined by the House) are to be treated any differently from federal lands outside the zone; rather, the same threshold—"directly affecting"—was to apply to *all* federal activities wherever these occurred.

[28] In light of this concession, it is a mystery how DOI's position concerning the legislative intent of the clause is at all "evident." DOI Br. at 22.

DOI Br. at 23. Many changes, modifications, additions, deletions, and compromises were effected in conference, and it is only by a leap of faith that DOI can assert that the conferees' decisions concerning two distinct and unrelated sections of the CZMA, §§ 304 and 307(c)(1), were in any way connected.[29] DOI's historical revisionism notwithstanding, the District Court was correct in reading the language of the conference substitute as an *expansion* of the geographic scope of § 307(c)(1).[30]

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[29]In discussing the 1972 legislative history, WOGA cites language from Senator Hollings on the Senate floor. WOGA Br. at 38. The Senator's comments, however, are obviously irrelevant to the meaning of "directly affecting" since they were delivered *before* the conference committee's expansion of the more restrictive language in the original Senate bill, which did limit federal consistency to activities *in* the coastal zone.

[30]Moreover, the admittedly slender 1972 legislative history that *does* exist concerning the precise meaning of "directly affecting" supports the decisions of the lower courts. The most plausible account of the Conference Committee's choice to expand the provisions of § 307(c)(1) by substituting the words "directly affecting" is that such an expansion was intended to complement the conference's acceptance of similarly expansive language in § 307(c)(3). In the Senate bill, both (c)(1) and (c)(3) had the same geographical scope. When the conference committee instead adopted the House version of (c)(3), which applied to the issuance of federal licenses and permits "affecting land or water use in the coastal zone," it simultaneously adopted the "directly affecting" clause, so that once again the geographic scope of the two complimentary consistency provisions—(c)(1) and (c)(3)—was roughly the same.

Such a reconstruction of the legislative intent is buttressed by the Conference Committee's suggestion of the relatedness of the two consistency provisions and their similar geographic thresholds: "As to the use of [federal lands not included within a state's coastal zone] which would *affect* a state's coastal zone, the *provisions* of section 307(c) would apply." H.R. Conf. Rep. No. 1544, 92nd Cong., 2d Sess. 12 (1972) (emphasis added). This history suggests that petitioners place too much emphasis on the differences between the (c)(1) and (c)(3) thresholds, *i.e.*, the importance of

In the end, the most that can be said on petitioners' behalf concerning the 1972 legislative history is that some ambiguity may exist regarding the meaning of "directly affecting." Any ambiguity, however, has subsequently been eliminated by regular and consistent congressional declarations supporting the applicability of § 307(c)(1) to OCS lease sales.

1974: In 1974, a print released by the Senate Committee on Commerce specifically cited the CZMA as one of "several Federal statutes [that] *collectively* establish a legal and administrative system for the management and control of outer continental shelf oil and gas development."[31] In another passage describing the CZMA regime in detail, the print reads:

> States that adopt management programs consistent with Federal guidelines gain additional leverage in dealing with the Federal government[.] Federal activities, or those licensed by the Federal government

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"directly" as a restrictive qualifier. DOI Br. at 21, WOGA Br. at 35. *See also* n.24, *supra.*

We do not contend here that the thresholds for (c)(1) and (c)(3) are identical, because the language of the two provisions does differ, and, where possible, every word of a statute should be given effect. *Bowsher v. Merck & Co., Inc.*, 103 S. Ct. at 1593. We do contend, however, that petitioners' overly restrictive and technical reading of "directly" is unwarranted in light of the expansive purpose that these sources indicate underlie the insertion of the phrase "directly affecting the coastal zone."

In contrast to *Bowsher*, where the word "directly" was specifically introduced as an amendment to *restrict* the pre-existing statutory phrase "pertaining to," here the phrase "directly affecting" was specifically introduced to *expand* earlier statutory language.

[31]Outer Continental Shelf Oil and Gas Development and the Coastal Zone, *supra*, n.4, at 55 (emphasis added). Specifically noting the CZMA's requirement of "consistency of Federal programs," the report goes on to declare:

> The Secretary of the Interior is authorized to grant oil and gas leases on the shelves and is also responsible for administering the leases including prescribing the rules necessary for regulat-

> that affect a state's coastal zone must in general, be consistent with the State's approved management program. This gives the States influence in dealing with the Federal government where differences of opinion exist concerning proposed Federal actions that would affect the coastal zone. OCS development is regarded as among the most significant Federal actions affecting the Coastal Zones.

Id. at 79. Thus, both § 307(c)(1), governing "Federal actions," and (c)(3), regulating "those licensed by the Federal government," were viewed as applicable to OCS development, in the broad sense of that term, *i.e.*, opening the OCS to commercial exploitation.

1975: The following year, in favorably reporting its version of amendments to the CZMA, the Senate Commerce Committee noted:

> There is very little coordination or communication between Federal agencies and the affected coastal States prior to major energy resource development decisions, *such as the decision to lease* large tracts of the OCS for oil and gas development. . . . Full implementation of the Coastal Zone Management Act of 1972 and recognition of its capability to solve energy-related conflicts could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act.

S. Rep. No. 277, 94th Cong., 1st Sess. 3 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 1770 (emphasis added). Pointing out that "States are likely to be significantly affected—economically and otherwise—by Federal *leases* for oil exploration and production on adjacent OCS

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ing oil and gas development *in a manner consistent with Acts listed above.*

Id. at 55-56 (emphasis added). Since this passage speaks of the obligations of the Secretary of the Interior himself, and not of private applicants, it can only refer to the applicability of § 307 (c)(1) to the OCS leasing process.

lands," *id.* at 11, the Report goes on to discuss the applicability of the CZMA consistency measure to the OCS:

> Section 307 is the portion of the Act which has come to be known as the "Federal consistency" section. It assures that once State coastal zone management programs are approved and a rational management system for protecting, preserving and developing the State's coastal zone is in place (approved), the *Federal departments, agencies and instrumentalities* will not violate such a system but will, instead, conduct themselves in a manner consistent with the State's approved management program. *This includes conducting or supporting activities in or out of the coastal zone which affect that area.*

Id. at 36-37 (emphasis added). The last sentence is an unambiguous reference to the provisions of § 307(c)(1), using, as it does, the "conducting or supporting" language of that section. This discussion continues by describing the provisions of § 307(c)(3) and concludes with the following passage demonstrating that *both* (c)(1) and (c)(3) apply to the OCS:

> [T]he law already provides an effective mechanism for guaranteeing that Federal activities, *including* those supported by, and those carried on pursuant to, Federal authority (license, lease, or permit) will accord with a rational management plan for protection, preservation and development of the coastal zone. One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of *Federal activities* on the Outer Continental Shelf beyond the state's coastal zones, *including* Federal authorization for non-Federal activity, but *under the act as it presently exists*, as well as the S. 586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the *consistency requirements do apply.*"

Id. at 37 (emphasis added). "Federal activities" are governed by (c)(1); "non-federal activities" carried out pur-

suant to federal authorization are subject to (c)(3). Both sections were designed to apply to the OCS "if the activity may affect the State coastal zone." *Id.*[32]

The House Report is also illuminating:

> [T]he Committee wants to assure coastal states in frontier areas that the OCS *leasing process* is indeed a *federal action* that *undoubtedly* has the potential for affecting a state's coastal zone and, hence, must conform with approved state coastal management programs. . . Given the obvious impacts on coastal lands and waters which will result from the federal action to permit exploration and development of offshore petroleum resources, it is difficult to imagine that the original intent of the Act was not to include such a major federal coastal action within the coverage of "federal consistency." . . . One major encouragement [to coastal states] has been the belief that in the future, the impacts which flow from federal Outer Continental Shelf leasing will have to conform to state and local prescriptions about the best location for energy support and industrial facilities. The Committee be-

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[32]DOI is thus simply wrong when it asserts that "no one suggested that the consistency provision of section 307(c)(1) applied to lease sales." DOI Br. at 33. In addition to the references to (c)(1) applicability in the Committee report discussed *supra*, clear and unambiguous statements of (c)(1)'s applicability appear in Congressional Research Service, "Effects of Offshore Oil and Natural Gas Development on the Coastal Zone, A Study Prepared for the Ad Hoc Select Committee on Outer Continental Shelf," 94th Cong., 2d Sess. 93 (Comm. Print 1976) (hereinafter cited as "Effects"); Oceans Programs, Office of Technology Assessments, "Offshore Oil and Gas Development, A Study for the Ad Hoc Select Committee on Outer Continental Shelf," 95th Cong., 1st Sess. 155-157 (Comm. Print 1977) (hereinafter cited as "Offshore Oil"); H. R. Rep. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977); 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979); S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980); H. R. Rep. No. 1012, 96th Cong. 2d Sess. 28 (1980); H. R. Rep. 269, 97th Cong., 1st Sess. 14 (1981) (Additional Views of Congressman Studds and d'Amours).

> lieves it would break faith with the states not to state plainly its clear intent to include major federal actions as Outer Continental Shelf leasing under the "federal consistency" section.

H. R. Rep. 878, 94th Cong., 2d Sess. 37, 52-53 (1975) (emphasis added).

1976: Petitioners make much of the fact that in Conference, Congress decided not to insert the word "lease" into § 307(c)(3), but instead adopted the provisions of what is now § 307(c)(3)(B). DOI Br. at 31-35; WOGA Br. at 40-42. Their argument is fundamentally misconceived. As discussed in more detail in Part IV.B., *infra*, Sections (c)(1) and (c)(3) contain different statutory language, apply to different actions, establish different consistency standards, and address different parties. The most that can be said of the Conference Committee's substitution of § 307(c)(3)(B) is that the *applicant* for a federal OCS lease does not have to engage in a § 307(c)(3)(A) consistency determination before obtaining the lease. But as both the Justice Department and the District Court have noted, petitioners' argument that the passage of § 307(c)(3)(B) somehow displaces § 307(c)(1) must be rejected as an impermissible repeal by implication. DOI Pet. at 48a; Department of Justice Opinion, J.A. 42, Cal. Exh. L-15,[33] *see Morton v. Mancari*, 417 U.S. 535, 549-51 (1974). In addition, petitioners' assertion completely contradicts their concessions elsewhere that § 307(c)(1) does apply to federal OCS lease sale decisions.[34]

[33] NOAA's regulations are in accord: Non-OCS leases *are subject* to § 307(c)(3)(A), OCS leases are not, and DOI's pre-lease activity is subject to (c)(1). 15 C.F.R. § 930.51(a) (comment), 44 Fed. Reg. 37150 (1979); 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979).

[34] Two further points are in order concerning the 1976 legislative history. First, the history of the (c)(3) amendments highlights the error of petitioner WOGA's insistence that a statutory provision must be accompanied by a "clear statement" that it applies to

1980: In 1980, Congress conducted a comprehensive examination of the CZMA and enacted the Coastal Zone Management Improvement Act of 1980.[35] As both houses were aware of the dispute between California and DOI over the meaning of the "directly affecting" clause and the applicability of § 307(c)(1) to OCS leases, both Committee Reports specifically and carefully addressed those issues, sending the parties and the courts a distinctively clear message:

> The Department of the Interior's activities which preceded lease sales [are] *to remain* subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development *commences* at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone. Coordination

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DOI's OCS activities. *No one* in Congress in 1976 doubted that with the insertion of the word "lease," § 307(c)(3) would apply to *OCS* leases. Second, and relatedly, the House and Senate Reports and Floor debates clearly demonstrate Congress' belief that even *without* the addition of the word "lease," (c)(3) applied to OCS leases. Insertion of the word "lease" was a "technical" amendment, a "clarification" of "our original congressional intent." S. Rep. No. 277 at 19, 36; H. R. Rep. 878 at 52-53; 122 Cong. Rec. 23053 (comments of Sen. Hollings), 23084 (comments of Sen. Williams) (1976). The various congressional statements obviously contradict WOGA's assertion that

> there is no basis in the CZMA or OCSLA for believing that Congress, at any time when it originally enacted those statutes or subsequently amended them, contemplated that the Secretary of the Interior's selection of OCS tracts for leasing would in any respect be influenced by state CZMA programs.

WOGA Br. at 20; *see also id.* at 32 n.25; DOI Br. at 20, 34 n.26.

[35]The House Oceanography Subcommittee alone "conducted nine oversight hearings, solicited testimony from some 300 groups and individuals, and received over 2,000 pages of testimony." H. R. Rep. No. 269, *supra*, n.32, at 12.

> must *continue* during the critical exploration, development, and production stages.

S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) (emphasis added).

> The [changes wrought in 1976] did not alter Federal agency [*i.e.*, § 307(c)(1)] responsibility to provide states with a consistency determination related *to OCS decisions which preceded issuance of leases. . . .*

H. R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (emphasis added.)[26]

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[26]WOGA seeks to avoid the obvious impact of this House Report by arguing that the report "observed that the 1972 Act gave the States 'no part in any decision concerning development' " on the OCS. WOGA Br. at 43. WOGA's reading of the inner-quoted language is, however, obviously unsupportable in light of the House's clear statement only two pages later that § 307(c)(1)—passed as part of the 1972 Act—*does* apply to OCS lease sales. H. R. Rep. No. 1012 at 28. *See also* n.34, *supra*. Although the 1980 passage WOGA cites is hardly a model of clarity, a careful examination of the passage and its context demonstrates the error of WOGA's reading.

The immediate antecedent of the clause WOGA cites is not the 1972 CZMA, as WOGA implies, but rather this court's decision in *United States v. Maine*. The passage cited is therefore best understood as simply restating the holding of *Maine*: "the States [*ex proprio vigore*] would have no part in any decision concerning the development on the [OCS] nor would the States [*ex proprio vigore*] benefit from any lease bonuses or royalties." H. R. Rep. No. 1012 at 26-27. As is clear from the House Report at 28, the 1972 CZMA had already addressed the first prong of the *Maine* holding concerning coastal state participation in OCS decisionmaking by making certain coastal states with federally-approved plans federal agents delegated with power to implement a national policy of coastal zone protection. The 1972 Act had not, however, addressed the second prong of *Maine*—the issue of OCS royalties. The "problem" in *Maine's* wake, resolved by the 1976 CZMA Amendments and referred to in the 1980 House Report passage WOGA cites, *id.* at 26, is that coastal states would receive none of the proceeds of OCS royalties and thus had no funds to deal with the very real coastal impacts of offshore oil development. The House Report thus continues: "Under those

Embracing the 1971 "functional interrelationship" formulation, the House Report goes on to list the benefits of a liberal application of "directly affecting":

> First, it fosters consultation between Federal and State agencies at the earliest practicable time. This, in turn, enhances the ability of the States to plan for and manage the coastal zone effects which are directly linked to Federal activities. It also allows Federal agencies to avoid the irretrievable commitment of resources for Federal activities likely to lead to results inconsistent with the requirements of approved state programs. Secondly, broad opportunities for States to influence Federal activities enhances the incentive of the consistency provisions, thereby reinforcing voluntary State participation in the national program. Finally, an expansive interpretation of the ["directly affecting"] threshold test is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act.

Id. at 34-35.[37]

1981: In 1981, the House Committee again reiterated its view by reporting out a resolution specifically dis-

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circumstances, efforts to amend the Coastal Zone Management Act of 1972 were initiated." The 1976 CZMA Amendments created a coastal energy facility impact program that provided funding to address this problem.

[37]Petitioner DOI cites a remark by Congressman Studds, Chairman of the House subcommittee, on the floor of the House but misrepresents its true significance. DOI Br. at 40. When Congressman Studds was questioned about the language of the 1980 report and replied that it was not intended to "modify the term directly affecting," he was simply restating the fact that the 1980 report was in perfect harmony with original congressional intent and every subsequent congressional declaration. 126 Cong. Rec. H.10111-12 (daily ed. Sept. 30, 1980). Our reading is supported by Congressman Studds' written comments the following year, which are found at H.R. Rep. No. 269, *supra*, n.32, at 11-15.

approving a NOAA regulation defining "directly affecting" in a narrow and technical manner—indeed, "in a way more nearly consistent with, if not identical to, that urged" by petitioners.[38] DOI Pet. at 17a. A resolution of disapproval was also introduced in the Senate but both resolutions were mooted when NOAA withdrew the offensive regulation. 47 Fed. Reg. 4231 (1982).

The CZMA thus offers a decade of consistent and convincing legislative history. Year after year, Congress has affirmed and reaffirmed its intention that "directly affecting" be broadly construed and, more specifically, that § 307(c)(1) be applied to DOI's OCS lease sales and prelease activities.

D. The Decisions of the Lower Courts in No Way Conflict with, but Are in Fact Strongly Supported by, the Legislative History of the OCSLA

Ultimately, it is ironic that petitioners persist in their effort to read the CZMA through the lens of the OCSLA instead of looking properly to the CZMA first to understand the scheme of cooperative federalism the statute at issue establishes. For despite the fact that the OCSLA is not the correct source to consult in the first instance for the proper construction of § 307(c)(1), it is evident that the legislative history of the OCSLA offers additional support for the decisions of the lower courts. Indeed, some of the clearest statements of DOI's obligation to render a § 307(c)(1) consistency determination at the OCS lease sale stage appear in OCSLA legislative history.[39]

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[38] *See* H.R. Rep. No. 269, *supra*, n.32, at 6.

[39] As early as 1975, the applicability of § 307(c)(1) to OCS leasing was understood by the Senate Committee on Interior and Insular Affairs. In its 1975 Report, the Committee indicated that it "had the benefit of" the Commerce Committee print, "Outer Continental Shelf Oil and Gas Development and the Coastal Zone"—a print that, as discussed *supra* at 28-29, affirms that DOI's OCS-related activites are governed by the CZMA consistency requirement for "Federal activities . . . that affect a state's coastal zone," *i.e.*, § 307(c)(1). *See* S. Rep. No. 284, 94th Cong., 1st Sess. 23 (1975).

In March 1976, the House Ad Hoc Select Committee on the Outer Continental Shelf released a committee print which had been prepared pursuant to the request of Chairman John Murphy. This committee print unequivocally affirms CZMA's applicability to OCS development: The 1972 CZMA is referred to as "major legislation with a *major* impact on OCS development." "Effects," *supra*, n.32, at 8 (emphasis added). Pointing out that the OCSLA "does not stand alone in administering the OCS, [but] must be read in conjunction with other laws," the document notes the application of § 307(c)(1) to the OCS, quoting its language, and notes:

> Although at the present time there are no approved management programs, if and when such programs are approved, OCS leasing and the resulting activity *will* need to be reconsidered in light of the State's efforts to manage their coastal margins under their approved programs.

Id. at 93 (emphasis added). A later passage explains:

> The [CZMA] requires a reordering of the Federal role to respond to the State guidelines rather than transmitting guidelines from Washington. . . . OCS development is regarded as among the most significant Federal actions affecting the Coastal Zones.

Id. at 228-29.[40]

Two months later, the House Committee released its report on OCSLA amendments. The report specifically cites the CZMA as a statute having "application to OCS areas and operations," H.R. Rep. No. 1084, 94th Cong., 2d Sess. 51 (1976), and goes on to list the "OCS-related responsibilities," of the Commerce Department as follows:

> The Coastal Zone Management Act of 1972 authorizes the Secretary of Commerce to provide grants-in-aid

[40]Moreover, the print devotes an entire appendix to a catalogue of provisions of the California Coastal Plan (then pending federal approval) that might be applicable to the OCS. *See id.*, Appendix XXIII.

> to coastal states to encourage the establishment of management programs for uses of land and water in coastal areas, *and to require consistency of federal programs with approved state plans.*

Id. at 52 (emphasis added).

In 1977, the Murphy Committee released another print that further illuminates the Committee's understanding of the relationship between the CZMA consistency provisions and OCS lease sales. The language of the print is crystalline:

> Under the 1972 Act, OCS leasing must be conducted in a manner which is "to the maximum extent practicable" consistent with approved State management plans. Under 1976 amendments to the Act, exploration and development permits are subject to a limited veto by the States as explained below.
>
> Much of the confusion about Federal consistency stems from the fact that there are two standards of consistency provided for in the CZM Act. The first standard of consistency *does* apply to leasing, but it is the less strict of the two standards. Section 307(c)(1) and (2) provide that Federal agencies will conduct or support activities and development projects which will effect [sic] the coastal zone in a manner which is consistent with State CZM programs "to the maximum extent practicable." The Federal agency itself decides whether or not its activities are consistent with state programs.

"Offshore Oil," *supra*, n.32, at 155 (emphasis in original).

The 1977 House Report on OCSLA Amendments echoes the view of its earlier committee prints; indeed, the prominent favorable citations of the two above-quoted prints virtually incorporate them by reference into the Committee Report. *See, e.g.*, H.R. Rep. No. 590, 95th Cong., 1st Sess. 55 n.l., 57 n.10, 58 n.22, 74 n.27. The Report specifically notes the relevance for the OCS of the CZMA requirement "for consistency of federal *programs* with approved

plans." *Id.* at 58 (emphasis added). In discussing Subsection 18(f) of the proposed OCSLA Amendments, the Committee indicated its belief that the "consistency requirement established pursuant to the Coastal Zone Management Act of 1972" would constrain DOI; since CZMA § 307(c)(3)(B) addresses private applicants, this discussion can only refer to § 307(c)(1). Finally, and most important, the Committee affirmed in no uncertain terms its awareness—an awareness doubly confirmed by the earlier committee prints—that, under the CZMA, "certain OCS activities, *including lease sales* and approval of development and production plans must comply with 'consistency' requirements as to coastal zone management plans approved by the Secretary of Commerce." *Id.* at 153 n.52 (emphasis added). The Committee went on to stress that nothing in the proposed OCSLA Amendments "is intended to alter procedures under [the CZMA] for consistency once a State has an approved Coastal Zone Management Plan." *Id.* This intention, of course, was formalized in the OCSLA savings clause, 43 U.S.C. § 1866(a).

In the end, the combined legislative histories of the CZMA and OCSLA present a compelling pattern of congressional pronouncements supporting the decisions of the lower courts. Congress has spoken not once or twice, but time and time again. Each time, its words confirm the correctness of the lower courts' holdings.

The legislative history we present is entitled to substantial weight. Not only is it entirely consistent with the language, purposes, and policies of the CZMA, but it also represents a consistent series of congressional declarations regarding the very issue in this case: the applicability of § 307(c)(1) to DOI's OCS lease sales. The earlier declarations are noteworthy because they emerged from committees with CZMA and OCSLA oversight engaged in enacting or amending legislation related to the consistency provisions of the CZMA. Later declarations are entitled to significant weight because they illuminate, confirm, and

clarify original intent,"[11] and were rendered in the context of a comprehensive review of the CZMA with specific awareness of the disagreement between DOI and coastal states over the meaning of § 307(c)(1). Moreover, when added to NOAA's interpretation of the consistency requirements of § 307(c)(1) (to which we turn next), these later declarations have given rise to substantial reliance by coastal states considering voluntary participation in the CZMA program.

E. The District Court's Holding Is Supported by the National Oceanic and Atmospheric Administration's Longstanding Interpretation of Section 307(c)(1)

It is a settled principle that an agency's interpretation of a statute that it is assigned by Congress to implement is normally entitled to deference from the courts. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975). The National Oceanic and Atmospheric Administration is the agency within the Department of Commerce charged with the responsibility for promulgating regulations under the CZMA. NOAA's longstanding interpretation of § 307 (c)(1) is that the Secretary of the Interior's lease sale decisions do directly affect the coastal zone and thus require a consistency determination.

In 1977, in its proposed rules on the § 307 federal consistency requirements, NOAA stated:

> NOAA is considering a position which treats the Department of the Interior's *pre-lease sale decisions, such as tract selections and choice of lease stipulations,* as a 'Federal activity' subject to the requirements of Section 307(c)(1) of the Act . . . This proposal would re-

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[11] "To the extent the 1971 and 1972 legislative history is slender and not dispositive of the issues in this case, subsequent legislative history can offer this Court an invaluable aid in its search for legislative intent. Since no state had an approved coastal plan until 1977, later congressional pronouncements may well be more focused than early ones. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 667 n. 8 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Bell v. New Jersey*, 103 S. Ct. 2187, 2194 (1983).

> quire the Secretary of the Interior to initiate such decisions in a manner consistent to the maximum extent practicable with approved coastal management programs when those decisions would directly affect the coastal zone.

42 Fed. Reg. 43591 (1977) (emphasis added). NOAA's test under the various consistency subsections—§ 307 (c)(1), (c)(2), and (c)(3)—was "significance." *Id.* at 43590.

In 1978, NOAA finalized the rules and stated that the legislative history on consistency demonstrated that § 307 (c)(1) (as well as (c)(2) and (c)(3)) was intended to apply to "all Federal actions which were capable of significantly 'affecting the coastal zone.' " 43 Fed. Reg. 10511 (1978).

In 1979, the Department of Justice took issue with NOAA's conclusion that the same test could be applied to different subsections of § 307. April 20, 1979, Department of Justice Opinion Letter, J. A. 46, Cal. Exh. L-15. However, the Justice Department expressly agreed with NOAA that DOI's pre-leasing activities are subject to the consistency requirements of § 307(c)(1). *Id.* at 42-43.

In response to the Justice Opinion, NOAA deleted the definition of "directly affecting" as "significantly affecting" in its final 1979 regulations. 44 Fed. Reg. 37142 (1979). However, it reiterated the view, confirmed by the Justice Department, that:

> Accordingly, ***section 307(c)(1) of the CZMA applies to DOI's OCS prelease sale activities directly affecting the coastal zone.*** . . . Implementation of this requirement at the OCS prelease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts, thereby reducing conflicts with affected States and avoiding delay in the exploitation of offshore energy resources.

44 Fed. Reg. 37142 (1979) (emphasis added); *see also* 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979).

NOAA's regulations stress liberal construction of the threshold test to favor inclusion of federal actions subject

to consistency review. 44 Fed. Reg. 37143; *see also* 15 C.F.R. § 930.34(b). Moreover, the regulations state that federal activities which involve the "disposal of land or water resources" are specifically included within the consistency provisions of § 307(c)(1). 15 C.F.R. § 930.31(b).

In a March 23, 1979 memorandum entitled "Application of CZMA Section 307(c)(1) Consistency Requirement to Interior's Pre-Lease Sale Activities," J.A. 48-62, Cal. Exh. L-14, NOAA stated that the principles of statutory construction demonstrate that DOI's position is incorrect and that § 307(c)(1) does apply to Interior's pre-lease sale activities. The memorandum states that "the agency responsible for implementation of the CZMA, NOAA, has, in fact pointedly continued to assert the clear applicability of the statutory language." *Id.* at 58. In addition, the memorandum explicitly supports application of § 307(c)(1) to Interior's tract selection and lease stipulation decisions. *Id.* at 60-62.

This view was reiterated on April 9, 1980, when NOAA stated:

> In our view *Federal consistency requirements subject final notice of OCS sales to consistency determinations.* The critical decision point in the OCS process influences tracts to be selected and stipulations to be imposed and thus sets in motion actions which will invariably affect coastal resources.

April 9, 1980 NOAA Letter to State Coastal Management Program Directors, C.R. 3, Cal. Exh. L-16 (emphasis added).

NOAA's longstanding interpretation obviously supports the application of § 307(c)(1) to the Secretary's OCS lease sales.[42]

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[42] For a brief time in 1981, NOAA changed its interpretation. However, adverse reaction from Congress and the coastal states led NOAA to reject the Interior Department's approach—the same approach pressed by the Secretary in this case. *See* DOI Pet. at 17a-18a, 57a-58a. This short-lived narrow definition is entitled to no weight. *Id.* at 18a, 57a-58a.

IV

LEASE SALE 53 AS PROPOSED WOULD DIRECTLY AFFECT THE COASTAL ZONE OF CALIFORNIA, AND, THUS, THE DEPARTMENT OF THE INTERIOR MUST COMPLY WITH THE REQUIREMENTS OF § 307(c)(1) PRIOR TO THE SALE OF LEASES

In the foregoing, we have established the clear intent of Congress in enacting § 307(c)(1) of the CZMA that this section apply to DOI's proposed OCS oil and gas lease sales. All that remains to be demonstrated is that the particular lease sale in question, Lease Sale 53, directly affects California's coastal zone, that is, that the lease sale initiates a series of events that have consequences in the coastal zone or, to use the alternative formulation, that it has a functional interrelationship with lands and waters in the coastal zone from an economic, geographic, or social standpoint. DOI Pet. at 15a. As will be shown, Lease Sale 53 plainly meets these definitions; therefore, DOI must comply fully with the requirements of § 307(c)(1) and its implementing regulations in order to fulfill Congress' intent. To postpone application of consistency requirements to the later exploration and development-production phases of the OCS oil and gas process, as DOI and WOGA suggest, would deny states the opportunity ever to review the conformity of the lease sale in its entirety with the state's federally-approved coastal program and thereby would greatly undermine the scheme of cooperative federalism Congress envisioned in enacting the CZMA. DOI Br. at 28-30, 41-49; WOGA Br. at 21-32.

A. Lease Sale 53 Directly Affects the California Coastal Zone

The courts below canvassed the direct effects of Lease Sale 53 on the coastal zone of California with great clarity. Judge Sneed, writing for the unanimous Ninth Circuit panel, discussed those effects as follows:

> We agree that the lease sale in this case directly affects the coastal zone. These direct effects of Lease

> Sale 53 on California's coastal zone are detailed by the district court. We need not repeat them here. It is enough to point out that *decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production.* Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction.
>
> Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3). The narrow definition of "directly affecting" urged upon us by the federal appellants would diminish the ability of the state to protect its coastal zone and to influence activities that were set in motion at the lease sale stage.

DOI Pet. at 12a-13a (emphasis added; citations omitted). As noted by the appellate court, the District Court provided a lengthy, though scarcely exhaustive, list of specific direct effects of Lease Sale 53 on the California coastal zone. DOI Pet. at 62a-65a; *see also id.* at 45a-46a.

The lower courts' assessments are obviously correct. The decisions made in anticipation of Lease Sale 53 do establish "the scope and charter" for all subsequent oil and gas activities on the tracts offered. As Lease Sale 53 is a frontier OCS sale, the pre-leasing decisions demarcated

the area newly to be opened to petroleum development and, consequently, determined the particular expanse of the California coast that could be affected by the sale. The tracts in controversy are in close proximity to California's coastal zone, beginning just beyond the three-mile marine limit of that zone. DOI Pet. at 39a. The stipulations that will attach to leases and control numerous of the lessees' activities throughout the life of those leases were formulated prior to the proposed sale date. Final Environmental Impact Statement for Lease Sale 53, C.R. 19, DOI Exh. L-B at 1-40. It is difficult to imagine federal activities that more clearly have a direct effect on the California coastal zone than these pre-leasing decisions by DOI.

B. It Is Both Logical and Necessary To Conduct a Consistency Determination Pursuant to § 307(c)(1) at the Lease Sale Stage

Despite the abundance of identifiable direct effects of Lease Sale 53 on California's coast, the petitioners attempt to portray the performance of a consistency determination at the lease sale stage as an impossible exercise because of the lack of specific information at that stage and therefore urge that consistency requirements cannot attach to OCS oil and gas operations until the exploration and development-production phases.[43] DOI Br. at 28-30; WOGA Br. at 27-31. However, as we have previously seen, Congress contemplated that the provisions of § 307(c)(1)

[43] In its Statement of the Case, WOGA also attempts to portray California's coastal management program as too vague to provide the basis for a finding of inconsistency at the leasing stage of Lease Sale 53. WOGA Br. at 7-10. WOGA's characterization conveniently glosses over DOI's failure to provide a consistency determination canvassing the numerous relevant provisions of the California Coastal Management Program, which would have allowed the California Coastal Commission a formal opportunity to respond and state its disagreements based on its interpretations of the provisions of the Program. 15 C.F.R. §§ 930.41-42. Rather, WOGA dwells upon the Commission's citation of two provisions of the Program in an

would apply at the lease sale stage. A common sense appraisal of what a consistency determination can accomplish at that stage, as opposed to consistency certifications of individual lessees' exploration or development-production plans at those later stages, underscores the logic of Congress' application of § 307(c)(1) to lease sales.

Only if the provisions of § 307(c)(1) are applied to DOI at the lease sale stage will *DOI's activity as a whole* ever be adequately measured against the provisions of affected coastal states' management programs. The consistency provisions of § 307(c)(3)(B), which the petitioners claim obviate the need for (c)(1) applicability at the lease sale stage, simply cannot perform this function, as is apparent from the very terms of that subsection.

First, § 307(c)(3)(B) applies not to the activities of DOI but to those of the lessee. Thus, under § 307(c)(3)(B), such critical actions by DOI as the choice of tracts to be offered and the formulation of standard lease stipulations cannot be examined directly by the state at the outset of the leasing process but only tangentially as these decisions are reflected in individual lessees' actions.

Further, the exploration and development-production plans to which § 307(c)(3)(B) applies, and the consistency certifications that must accompany them, are submitted individually by the various lessees at different times throughout the lease terms." Were § 307(c)(3)(B) the sole

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ad hoc resolution in protest of DOI's refusal to perform a consistency determination as evidence of the Program's vagueness. This resolution certainly does not represent any final finding or interpretation by the Coastal Commission of the extent to which, and the manner in which, Lease Sale 53 may be inconsistent with the California program. That must await the DOI's consistency determination.

"The Affidavit of Mari Gottdiener, California Coastal Commission, July 1, 1981, and Exhibits 1 and 2 thereto, J.A. 152-55, illustrate well the sporadic filing of consistency certifications by lessees for proposed exploration and development-production plans. These documents reveal that intermittently over a two-and-a-half year

means of consistency review, generic problems with a particular lease sale vis-a-vis the state's coastal program could only be dealt with on a tract-by-tract basis. Such an approach would be inefficient,[45] as well as unfair to the lessee, who should not have to bear the burden of addressing consistency problems that result from generic decisions by DOI. Such problems should be ironed out between DOI and the state coastal management agency at the outset.

Finally, consistency review on the piecemeal basis provided by § 307(c)(3)(B) would effectively preclude states from ever meaningfully evaluating and responding to the cumulative impacts of DOI's OCS lease sales on their coastal zones. While activities on any single tract might not be inconsistent with the terms of the state's management program, the aggregate effects of such activities on a number of tracts in a particular region could be wholly inconsistent with that program. Only by examining the sale as a whole pursuant to § 307(c)(1) can its cumulative impacts be adequately assessed.

Thus, there is no merit to petitioners' related arguments that the phased nature of OCS decisionmaking under the OCSLA eliminates the need for a consistency determination at the lease sale stage. DOI Br. at 27-30; WOGA Br. at 21-32. As we have just shown, logic supports the application of the § 307(c)(1) consistency requirements to DOI at the lease sale stage so that generic and cumulative inconsistencies of a proposed sale with a state's CZMA program can be avoided by the federal agency itself at the outset.

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period, twenty-seven consistency certifications for such plans for tracts in the Santa Barbara Channel were submitted to the California Coastal Commission for its concurrence.

[45] While petitioners give lip service to avoidance of judicial diseconomies, DOI Pet. at 18-20; WOGA Br. at 45-46, their suggestions that § 307's consistency requirements are not to be applied until the exploration and development-production phases are to the contrary. Litigation over consistency is hardly likely to decrease if all consistency problems, generic as well as particular, must be resolved on a tract-by-tract basis.

As the D.C. Circuit has recognized, the OCSLA process is "pyramidic in structure," proceeding by stages from broad national planning to specific lease sale planning to the peculiarities of individual exploration and development-production plans. *California v. Watt*, 668 F.2d 1290, 1297 (D.C. 1981). The mere fact that more concrete information will be available in the final phases involving approval of lessees' tract-specific plans does not render an examination at the outset of the overall consistency of a lease sale proposal with the adjacent state's coastal management program premature or unnecessary. The very fact that DOI can make decisions on which tracts to offer and what lease stipulations to apply based on the information available at the pre-lease phase belies any assertion that there is insufficient information at that stage to address a state's sale-wide consistency concerns. The pyramidic structure of the leasing program militates in favor of application of consistency requirements at the lease sale stage: As the pyramid narrows in later phases, opportunities to address broad issues will have been lost.

The petitioners' citations to other statutory schemes as applied to OCS leasing are not to the contrary.[46] *County*

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[46]Nor are the provisions of the 1978 OCLA Amendments that allow a degree of secretarial control over OCS leases after their issuance at all indicative of a congressional intent that § 307(c)(1) not apply to OCS lease sales. DOI Br. at 30; *see also* WOGA Br. at 27-31. First, applying as they do to individual leases, these provisions are not designed to address the cumulative and generic problems of an entire lease sale. 43 U.S.C. §§ 1334(a), 1340(c), 1351(h). Second, the standards for lease suspension and especially cancellation are high, requiring in the latter case findings that "serious harm or damage" to life, the environment, or one of several other interests is likely, that this threat will not "decrease to an acceptable extent within a reasonable period of time," and that "the advantages of cancellation outweigh the advantages of continuing" the lease or permit in question. 43 U.S.C. § 1334(a)(2)(A). Meeting states' general consistency problems with a lease sale through a lease-by-lease application of these provisions would, to say the least, be a cumbersome process. Finally, if a lease is cancelled, in many

of Suffolk v. Department of the Interior, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978), while holding that consideration under the National Environmental Policy Act of specific pipeline routes from OCS lease sites could be deferred until more information was available at later stages, also held that NEPA fully applied at the lease sale stage. Further, the court allowed the deferral of consideration of the pipeline routes until later stages because it found that the agency would still have full discretion to consider that issue and, if appropriate, reverse its actions at those later stages. Here, due to the pyramidic structure of OCS leasing, basic decisions by DOI at the lease sale stage, such as choice of lease stipulations and tract selection, cannot easily be undone at later stages.[47]

Nor does judicial interpretation of the Endangered Species Act support petitioners' argument for deferral of application of the CZMA consistency provisions to later phases of Lease Sale 53. While in *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), the court would not enjoin a lease sale because of the possibility of jeopardy to an endangered species at later phases of the OCS leasing process, it so determined because the ESA had properly been applied to the lease sale stage and a finding of no jeopardy at that stage had been made by the relevant federal agency.[48] *Id.* at 607-610. Further, the court found

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circumstances the lessee will be entitled to compensation, a further impediment to use of the cancellation provisions to deal with generic problems. 43 U.S.C. § 1351(h)(2)(C).

[47] *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979), is also cited by DOI in support of its theory that NEPA (and by analogy, CZMA) application can be deferred to later stages of the OCS process. DOI Br. at 29 n. 22. That opinion, which examined whether an impact statement on a lease sale was sufficiently detailed, offers no support for the proposition for which DOI cites it.

[48] DOI also suggests that, since the ESA would not prevent Lease Sale 53 from going forward although activities in later phases might jeopardize an endangered species, neither could California's con-

that specific lease stipulations had been imposed to ensure the species' freedom from jeopardy. *Id.* at 610. In other words, the requirements of the ESA were not avoided at the lease sale stage, which is of course exactly what DOI wishes to do here as regards the requirements of the CZMA. Instead, the court in *North Slope Borough* found that ESA concerns had been properly identified and addressed. DOI here owes no lesser duty to California as regards CZMA concerns.

CONCLUSION

For all of the foregoing reasons, we respectfully request that this Court affirm those portions of the Ninth Circuit's and District Court's decisions that the Department of the Interior has petitioned this Court to review.

Respectfully submitted,

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cerns about the consequences of Lease Sale 53 upon the sea otter affect the conduct of the sale under the CZMA. DOI Br. at 46-47 n. 43. This argument ignores the fact that the provisions of the California Coastal Management Program are not identical to those of the ESA and, thus, that some degree of harm to the sea otter short of the likelihood of jeopardy to the survival of the species that triggers the ESA might be inconsistent with those provisions.

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